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No. 77-1736 (A-1037)

In the

Supreme Court of the United States

OCTOBER TERM, 1977

ALBERT SMITH, President of the Village of Skokie, Illinois; JOHN N. MATZER, JR., Village Manager of the Village of Skokie, Illinois; HARVEY SCHWARTZ, Corporation Counsel of the Village of Skokie, Illinois; and the VILLAGE OF SKOKIE, Illinois, a municipal corporation,

Petitioners,

vs.

FRANK COLLIN and the NATIONAL SOCIALIST PARTY OF AMERICA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents pray that the requested Writ of Certiorari not issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 22, 1978, which affirmed the judgment of the United States District Court for the Northern District of Illinois, entered on February 23, 1978.

OPINIONS BELOW

The Petition for Writ of Certiorari is filed from the decision of the Circuit Court of Appeals for the Seventh Circuit, set forth in Petitioners' Appendix B. That decision affirmed the ruling of the District Court, set forth in Petitioners' Appendix A.

QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals was correct in affirming the judgment of the District Court that certain provisions of three ordinances of the Village of Skokie, which prohibited approximately 50 uniformed members of the National Socialist Party of America from holding a public assembly in front of the Skokie Village Hall where no speeches would be made or literature distributed, and in which signs would display the swastika and would state "Free Speech for White People," and the like, violated the First Amendment to the United States Constitution?

REASONS FOR REFUSING CERTIORARI

A. The Court of Appeals for the Seventh Circuit was correct in its judgment that the ordinances in question are unconstitutional because they violate the First Amendment.

B. The Court below distinguished the decision in this case from the decision in *Beauharnais* v. *Illinois* and did not, as petitioners suggest, issue an opinion overruling *Beauharnais*.

C. The demonstration by respondents in Skokie, which gave rise to this dispute, was cancelled with alternate peaceable assemblies being held at locations in the City of Chicago, Illinois.

PROCEDURAL HISTORY

During the month of March, 1977, respondents Frank Collin and the National Socialist Party of America announced plans to hold a public assembly in front of the Village Hall in Skokie, Illinois, on May 1, 1977. Village officials responded by obtaining, in state court, a preliminary injunction against the demonstration. After state courts refused to stay the injunction pending appeal, the United States Supreme Court ordered an immediate appellate review or a stay of the injunction. *National Socialist Party of America* v. *Village of Skokie*, 423 U.S. 43 (1977). The injunction was subsequently reversed: first in part, *Village of Skokie* v. *National Socialist Party of America*, 51 Ill. App. 3d 279, 366 N.E. 2d 347 (1977); and then in its entirety, *Village of Skokie* v. *National Socialist Party of America*, 69 Ill. 2d 605 (1978). No appeal was sought in this Court.

On May 2, 1977, the Village enacted three ordinances to prohibit demonstrations such as the one Collin and the

National Socialist Party of America had planned. On August 13, 1977, respondents filed the present case in the United States District Court, challenging the relevant provisions of Skokie's new ordinances. On February 23, 1978, the Honorable Bernard M. Decker, district judge, ruled that the ordinances were facially unconstitutional. On May 22, 1978, the Seventh Circuit Court of Appeals affirmed that ruling. On June 12, 1978, this Court denied a stay of that ruling, thus refusing to bar respondents' public assembly. A short time later, respondents voluntarily shifted the assembly from the Village of Skokie to the City of Chicago where peaceable public assemblies were held on June 24 and July 9, 1978.

STATEMENT OF FACTS

Believing that the Statement of Facts set out by petitioners is insufficient, respondents rely upon the principal facts which were found and set forth in the opinion of the District Court below:*

A. The Parties

Skokie is a municipal corporation, north of Chicago, which is generally regarded in the Chicago area as a predominantly Jewish community. In fact, as of 1974, the Jewish population was 40,500 out of a total population of 70,000. Under the Illinois Constitution, Skokie is a home-rule unit and, as such, has plenary legislative authority to enact ordinances for the protection of the public welfare within its borders. Ill. Const., Art. VII, §6(a). (Appendix 1a-2a)

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* When a citation to the District Court's opinion appears in the Statement of Facts, the language is taken *verbatim* from that opinion. Other references will refer to evidence appearing in the record and will be cited accordingly.

Respondent Collin testified that the National Socialist Party of America is "a Nazi organization," and that in public appearances its members wear uniforms reminiscent of those worn by members of the German Nazi Party during the rule of the Third Reich. Specifically, respondents employ the swastika as a party symbol. Among their more controversial political views, respondents believe that black persons are "biologically inferior" to whites and should be "expatriated" to Africa, and that American Jews have excessive influence in government and close ties to international communism. Collin stated that this Jewish influence should be "exposed and documented and presented to the American public," but denied that plaintiffs endorse the Third Reich's "final solution" to the problem of Jewish influence—genocide. (Appendix 2a)

B. The Permit Application

In late 1976 respondents planned a series of demonstrations in Jewish communities, including Skokie. According to respondents' publications, this campaign was based on the belief that Jews are responsible for busing and racial integration in the Chicago school system, which respondents have been protesting in other parts of the Chicago area. Respondents were denied permission to demonstrate in a Skokie park because of a Skokie Park District ordinance which required them to obtain $350,000 in liability and property insurance. (Appendix 2a)

Respondents then planned a demonstration in the Village of Skokie to protest the Park District ordinance. The demonstration was scheduled for May 1, 1977. On March 20, Collin notified Skokie Police Chief Kenneth Chamberlain of respondents' plans and assured him that the demonstration would be brief, peaceable and orderly. News of the planned demonstration caused considerable consterna-

tion in Skokie. The situation was exacerbated by the appearance of some of respondents' handbills within the Village and by a rash of offensive and threatening telephone calls to Skokie residents with Jewish surnames. Although there is no evidence that respondents were responsible for these calls, they undoubtedly stirred public sentiment against the proposed demonstration.* As a result of this sentiment, the Village decided to attempt to prevent the demonstration. On April 29, 1977, a preliminary injunction against the demonstration was obtained in state court (later vacated). On May 2, 1977, the Village enacted the three ordinances at issue in this action. (Appendix 3a).

On June 22, 1977, Collin applied for a permit under Ordinance #994 which requires, *inter alia,* procurement of $350,000 liability and property damage insurance as a prerequisite for any permit. The application recited that the proposed public assembly would take place on July 4, 1977, would last about a half hour, and would not disrupt traffic.** It stated further that the participants would wear uniforms including swastikas and carry placards carrying statements such as "White Free Speech," "Free Speech for the White Man," and "Free Speech for White Americans," but would not distribute handbills or literature. The evidence shows that the location selected for the parade was in a commercial, rather than residential, area of Skokie. Finally, the applicants stated that they could

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* Defendants did not suggest that plaintiffs were responsible for the calls and the reporting officer on one of the police reports admitted into evidence expressed the opinion that it was doubtful that plaintiffs were responsible. (Appendix 3a.) (This footnote is from the District Court's opinion.)

** The demonstrators were to march in single file, back and forth, in front of the Village Hall; no speeches were to be made. (App. 3a-4a.)

not obtain the required insurance and requested that the Village either waive the requirement or assist applicants in finding an insurer. Respondents' application was denied by petitioner John Matzer, Jr., the Village Manager, on grounds that the respondents planned to wear military-style uniforms in violation of Ordinance #996. (Appendix 3a-4a)*

C. The Ordinances

Ordinance #994 is a comprehensive permit system for all parades or public assemblies of more than 50 persons anywhere within Skokie. It requires all permit applicants to obtain $300,000 in liability insurance and $50,000 in property damage insurance. Ordinances #995 and #996 are both criminal measures: #995 prohibits the dissemination of material which incites racial or religious hatred, with intent to incite such hatred; #996 prohibits public demonstrations by members of political parties while wearing military-style uniforms. These ordinances are also enforced through the permit mechanism of #994. A specific provision of that ordinance, §27-56(c), requires that a permit be denied to public assemblies which will engage in the activity prohibited by #995 and a catch-all provision relating to assemblies organized for unlawful purposes, §27-46(j), serves the same function for #996. (Appendix 3a)**

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* On April 11, 1978, respondents submitted a renewed permit application to the petitioners by registered mail, seeking issuance of a permit for June 25, 1978. As previously noted, that assembly was subsequently held at a site in the City of Chicago, Illinois.

** The Court found that "the wording of the ordinances and the context in which they were enacted leave no doubt that they were intended to cover demonstrations by Nazi organizations." (Appendix 5a-6a). The court further characterized its finding as one of legislative intent.

D. Petitioner's Opinion Testimony

The petitioners presented evidence to support their claim that mental and emotional trauma can be caused by "racial slurs." (The District Court's opinion used the term "racial slurs" to generally characterize some of the speech prohibited by Ordinance #995 and §27-56(c) of #994.) (Appendix 13a-14a)

The Court summarized the testimony as follows:

> Prof. David Gutmann, Chief of Psychology Division at Northwestern University, testified in detail on the psychological effect of racial slurs on members of groups, such as blacks and Jews, that have been the victims of prejudice and oppression. Defendants also presented the opinion that the mere presence of plaintiffs in Skokie would have a severe harmful effect on Jewish survivors of World War II, but it is apparent that his views on this point are colored by his own interpretation of free speech and by his strong opposition to plaintiffs' political views. (Appendix 28a, n.11)

In addition to Professor Gutmann's testimony, the Court heard a variety of views, in support of the ordinances, from Japanese, Polish, Jewish and Latino individuals.

Referring to racial slurs directed at large groups, the Court made no finding as to the existence of psychological harm but specifically noted that:

> . . . the psychological trauma which they may cause is much more difficult to identify and prove than damage to reputation. It is particularly difficult to distinguish a person who suffers actual psychological trauma from one who is only highly offended. (Appendix 36a)

ARGUMENT SUPPORTING REASONS FOR DENYING CERTIORARI

The Petition for Certiorari should be denied in this case because the ruling below is correctly grounded on previous decisions of this Court which compelled the Courts below to hold the ordinances unconstitutional.

A. Overbreadth and Vagueness

The ruling of the courts below holding that Skokie's ordinances banning communications which are offensive to racial, religious and ethnic groups were unconstitutionally overbroad was correct. Ordinance #995 (Appendix 98a) punishes "dissemination of any materials" which "promotes and incites hatred" . . . "by reason of . . . race, national origin, or religion." Dissemination includes "display of markings and clothing of symbolic significance." Ordinance #994 (Appendix 91a) prohibits permits for assemblies which, *inter alia*, portray "lack of virtue" in others or "incite . . . hostility" towards others "by reason of reference to religious, racial, ethnic, national or regional affiliation." These words sweep far beyond any constitutionally permissible limit prohibiting the peaceable picketing planned by respondents.*

The ruling of the Seventh Circuit invalidating Ordinance #995 is summarized by the following statement of Judge Wilbur Pell:

> We conclude that 995 may not be applied to criminalize the conduct of the proposed demonstration. Because it is susceptible to such an application, we also conclude that it suffers from substantial overbreadth,

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* The Village conceded below that Ordinance #996, prohibiting wearing of military-style uniforms is unconstitutional.

> even if some of the purpose 995 is said to serve might constitutionally be protectible by an appropriate and narrower ordinance. (Appendix 65a)

Judge Pell reached the same conclusion with respect to the analogous section of Ordinance #994. (Appendix 65a-66a)

The authority which supports the rulings of the Seventh Circuit and the District Court is unequivocal.

The Supreme Court has recognized the chilling effect of comparable ordinances and has repeatedly struck them down. In *Gooding* v. *Wilson*, 405 U.S. 518 (1972), for example, the Court declared unconstitutional a Georgia statute making it a misdemeanor to use to another "opprobrious words or abusive language tending to cause a breach of the peace," on the ground that it was insufficiently narrow:

> Persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression. 405 U.S., at 521.

Thus, it is settled law that a statute which might be read to prohibit legitimate speech becomes, in fact, an unlawful interference with First Amendment guarantees. See also *Street* v. *New York*, 395 U.S. 576 (1969); *Bachellar* v. *Maryland*, 397 U.S. 288 (1964). The present Skokie ordinances are, if anything, even more offensive than those which the Supreme Court previously refused to uphold. See also *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615 (1971).

In an effort to draw attention away from the enormously broad reach of their ordinances, petitioners suggest that

the ordinances are limited to a prohibition of "inciting group hatred." However the ordinances, in fact, prohibit a great deal more. They seek to prohibit language which "portray[s] . . . lack of virtue . . . incite[s] violence, hatred, abuse or hostility . . . promotes and incites hatred . . ." (§27-54c, Appendix 94a; §§28-43.1 and 28-43.2, Appendix 99a)

In *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1972), moreover, this Court reaffirmed the validity of the overbreadth doctrine as applied to prohibitions on the expression of ideas. In upholding the particular statute which was attacked in *Broadrick* as being overbroad, the Court emphasized that the statute was not directed at "particular groups or viewpoints." 413 U.S., at 616. The District Court here found, by contrast, that the Skokie ordinances were directed at a particular viewpoint. (Appendix 5a, 6a)

Moreover, a strained reading of the ordinances is not required to conclude that not only much political rhetoric but also many literary works as well could be prohibited under their terms. As the Court of Appeals noted, the ordinances

> could conceivably be applied to criminalize dissemination of *The Merchant of Venice* or a vigorous discussion of the merits of reverse racial discrimination in Skokie. (Appendix 65a)

In addition, punishment under #994 and #995 for "dissemination of materials" which promotes and incites hatred, hostility or portray "lack of virtue" . . . "by reason of reference to religious, racial, ethnic, national, or regional affiliation . . ." would impose criminal sanctions pursuant to laws that give no clear warning of what is forbidden and are, therefore, unconstitutionally vague.

It is well settled that a law which does not clearly define the behavior prohibited violates the due process clause of the Fourteenth Amendment. *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). The requirement of clarity is particularly important where the law has a potentially inhibiting effect on speech. *Winters* v. *New York*, 333 U.S. 507 (1948).

In *Winters* v. *New York, supra*, the Court struck down as vague a statute which made it a crime to issue a publication in which stories of "bloodshed and lust" were so "massed" as to become "vehicles for inciting violent and depraved crimes against the person." 333 U.S., at 513. The Court expressly referred to the fundamental unfairness of such a statute in holding it unconstitutional:

> [A]n honest distributor of publications could [not] know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might be found to be "massed" so as to become "vehicles for exciting violent and depraved crimes." Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. 333 U.S., at 520.

The similarity in lack of clarity between the concepts of "inciting violent and depraved crimes" and the language in #995 and #994 is obvious. Even ignoring the numerous verbal ambiguities in the Skokie ordinances, the behavior sought to be prohibited is so ill-defined that no one attempting to exercise his right to political expression could reasonably be expected to know how to legally do so. And the Supreme Court, recognizing the danger to freedom that lurks in vague statutes restricting First Amendment freedoms, has repeatedly declared such statutes unconstitutional. See e.g., *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589 (1966); *Smith* v. *Goguen*, 415 U.S. 566 (1973); *Coates* v. *City of Cincinnati, supra*. As the Court stated in *NAACP* v. *Button*, 371 U.S. 415 (1963):

> Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. 371 U.S., at 438.

B. Beauharnais v. Illinois

The petitioners' contention that the ruling below overrules the decision of *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952), simply is not correct. The Skokie brief filed with this Court fails to address the Court of Appeals' treatment of the *Beauharnais* case and fails to identify any specific legal error which the Village challenges. Mere repetition of a different statute upheld in 1952 does not adequately defend their ordinances. (Petition for Cert, pp. 15-16.) In fact, the Seventh Circuit made clear that the majority ruling was based on the doctrine of overbreadth and did not overrule *Beauharnais*.

> In our opinion *Beauharnais* does not support ordinance 995, for two independent reasons. First, the rationale of that decision turns quite plainly on the strong tendency of the prohibited utterances to cause violence and disorder. The Illinois Supreme Court had so limited the statute's application, as the United States Supreme Court noted. *Id.*, at 254. The latter Court also pointed out that the tendency to induce breach of the peace was the traditional justification for the criminal libel laws which had always been thought to be immune from the First Amendment. *Id.* After stating the issue (whether Illinois could extend criminal libel to groups) the Court turned to Illinois' history of racial strife "and its frequent obligato of extreme racial and religious propagnda,"

id. at 261, and concluded that the Illinois legislature could reasonably connect the strife and the propaganda and criminalize the latter to prevent the former. *Cantrell* v. *Connecticut,* 310 U. S. 296, 310 (1940), was quoted, at 261:

> The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit *would incite violence and breaches of the peace* in order to deprive others of their equal right to the exercise of their liberties,* is emphasized by events familiar to all. These and other transgressions of [the limits to First Amendment rights] the States appropriately may punish. [Emphasis added.]

It may be questioned, after cases such as *Cohen* v. *California, supra; Gooding* v. *Wilson, supra;* and *Brandenburg* v. *Ohio, supra,* whether the *tendency to induce violence* approach sanctioned implicitly in *Beauharnais* would pass constitutional muster today. Assuming that it would, however, it does not support ordinance 995 because the Village, as we have indicated, does not assert appellees' possible violence, an audience's possible responsive violence, or possible violence against third parties by those incited by appellees, as justifications for 995. Ordinance 995 would apparently be applied in the absence of any such threat. The rationale of *Beauharnais,* then, simply does not apply here. [Emphasis in original.]

Further, when considering the application of *Beauharnais* to the present litigation, we cannot be unmindful of the "package" aspects of the ordinances and that the "insulting" words are to be made public only after a 30-day permit application waiting period. Violence occurring under such a circumstance would have such indicia of premeditation as to seem inconsistent with calling into play any remaining vitality of the *Beauharnais* rationale. (Appendix 59a-60a)

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* The Seventh Circuit's footnote 13 is omitted. (Appendix 60a)

Moreover, as the Seventh Circuit recognized, the proposed speech and assembly at issue here are protected by the First Amendment. (Appendix 5a) Thus, Skokie's ordinances are unconstitutionally applied to assemblies like those planned by respondents. In using the ordinances to deny respondents or others a permit to assemble because of their party symbols or military-style uniforms, petitioners were acting in an unconstitutional manner which is not compelled by these "group libel" ordinances.

Respondents' assembly was to consist of a number of uniformed individuals picketing silently in front of the Skokie Village Hall for a half hour. Their signs were to state: "Free Speech for White People," and "White Free Speech" in protest of the ordinance which prevented them from assembling in Skokie in the first place.

The sole communication that petitioners objected to in judicial proceedings is the display of the military-style uniforms and the swastika which were to be displayed on their picket signs and uniforms. In litigation between the same parties arising out of the same events which gave rise to this case, display of both the uniforms and the swastikas has been upheld by the Illinois courts as protected by the First Amendment. See *Village of Skokie* v. *National Socialist Party of America,* 69 Ill. 2d 605 (1978). In short, the communications at issue here do not fall into the category of communications which could be lawfully prohibited by Skokie's ordinances. Cf. *Blonder-Tongue Labs., Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971).

C. Petitioners' Other Arguments

Petitioners' other arguments also emphasize the notion that there is precedent to support the assertion that Or-

dinances #995 and #994 are valid protections of Skokie's residents against the psychic trauma and discrimination which respondents' ideas assertedly will cause. (Petition, pp. 17-24) For example, they cite *Contreras* v. *Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1977), which upheld a tort action by a Mexican worker against his employer for use of derogatory racial epithets directed personally at the worker on the job. The case does not, of course, save the Skokie ordinances from their vagueness and overbreadth. Moreover, the interpersonal communication there is quite different from the political demonstration which is the subject of this litigation. Petitioners' reliance on *Chicago Real Estate Board* v. *City of Chicago,* 36 Ill. 2d 530 (1967) upholding bans on "panic peddling" and "block busting" real estate tactics is similarly misplaced. Regulation of commercial speech is not subject to the exact same First Amendment strictures as is political communication. See *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U. S. 376, 385-386 (1973). In short, their tort law "trauma" argument has no basis in law as justification for censorship of political communication.

The Village of Skokie also persists in its contention that these ordinances may constitutionally be used to bar "intentionally false and defamatory" statements, suggesting that the Court of Appeals has somehow placed its seal of approval upon public calls to genocide. (Petition, p. 26) Thus, in this Court, as below, petitioners have argued the right of the Village to ban through these ordinances, the "direct racial or ethnic lie" (Petition, p. 28) and the "false and defamatory implication of evil to persons by reason of their parentage." (*Id.*, at 29) Considering this contention against a record showing a proposed public

assembly in front of a village hall, without speeches and without distribution of handbills, the Court of Appeals held that application of these ordinances to that situation could not be limited to statements of fact—false or otherwise. "To the degree that the symbols in question [uniforms and swastikas] can be said to assert anything specific, it must be the Nazi ideology, which cannot be treated as a mere false 'fact'." (Appendix 57a-58a) Further, the Court concluded, "The asserted falseness of Nazi dogma and, indeed, its general repudiation, simply do not justify its suppression." (Appendix 58a)

In addition, petitioners attempt to avoid their admission made before both the District Court and the Court of Appeals that "The Village *does not* contend that the forbidden conduct [speech which intentionally incites racial hatred] will create a clear and present danger of violence, riot, breach of peace, or other disorders." (Appendix 19a, Emphasis in original.) This position was maintained in the Court of Appeals. (Appendix 56a-57a); nonetheless, petitioners now suggest for the first time in these proceedings that the proposed assembly at the Village Hall would, in fact, have been an intentional incitement to riot and a deliberate provocation outside the protection of the First Amendment. (Petition, at 31) There is no support in the record for their changed position and their admission remains to the contrary. Moreover, petitioners' argument appears to be that a silent assembly at the Village Hall, attended by signs and symbols, would constitute *per se* group defamation, infliction of emotional distress, and deliberate incitement to riot. Such contentions do not meet the rigorous requirements of this Court's decision in *Brandenburg,* which must be complied with before speech may be suppressed as incitement to riot. *Brandenburg* v.

Ohio, 395 U. S. 444 (1969). This position was also rejected by the Illinois Supreme Court in *Village of Skokie* v. *National Socialist Party of America, supra.,* which petitioners have neither cited nor appealed to this Court.

Finally, petitioners have argued what amounts to a defense of their attempt to impose a prior restraint on the proposed demonstration. This argument is inappropriate for two reasons. First, as already noted, the demonstration was moved to a site in Chicago; and second, their contention that the proposed assembly could be barred has been considered and rejected by the Illinois Supreme Court. That Court explicitly held:

> . . . as we read the controlling Supreme Court opinions, use of the swastika is a symbolic form of free speech entitled to first amendment protections. Its display on uniforms or banners by those engaged in peaceful demonstrations cannot be totally precluded solely because that display may provoke a violent reaction by those who view it. Particularly is this true where, as here, there has been advance notice by the demonstrators of their plans so that they have become as the complaint alleges, "common knowledge" and those to whom sight of the swastika banner or uniforms would be offensive are forewarned and need not view them. A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen. *Village of Skokie* v. *National Socialist Party of America, supra,* at 618.

As previously pointed out, petitioners did not seek review of that decision in this Court; therefore, they should not be accorded an opportunity to collaterally attack that ruling in this case.

CONCLUSION

For the foregoing reasons the respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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